IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation, *Plaintiff in Error,* *vs.* MRS. A. E. REED, as Administratrix of the Estate of J. E. Reed, deceased, *Defendant in Error.*	No. 2301.

Upon Writ of Error to the United States District Court of the Territory of Alaska Third Division.

PETITION FOR REHEARING

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Now comes the plaintiff in error and respectfully presents and urges to this court its petition for a rehearing of the above entitled cause. The opinion herein was filed on the 9th day of February, 1914, and judgment affirming the judgment of the United States District Court for the Territory of Alaska, Third Division, was entered in accordance with said opinion.

This petition for rehearing is presented and

based solely upon the following ground:

The trial court permitted the plaintiff to offer evidence to show that the continuous hours of service of the crew on the derailed train exceeded the statutory limit of service, and this ruling of the trial court was duly excepted to at the time, and such ruling of the court properly assigned as error, and in the brief of plaintiff in error such ruling was specified as one of the errors relied upon, and the opinion of this court did not pass upon the error so excepted to and assigned.

I.

The witness Larson was permitted to testify that the crew on the train had been continuously in service for more than the statutory period and the admission of this testimony was excepted to and exception allowed. See Bill of Exceptions at pages 59 and 60 of the printed record. Evidence of this character was again admitted, over objection, and a specific objection was made to all testimony of that character, and the exception allowed. See Bill of Exceptions at pages 86 and 87 of the printed record. The witness Lee was permitted, over objection, to give like testimony, and an exception al-

lowed. See Bill of Exceptions, pages 93 and 94, and 145, of the printed record.

II.

The rulings of the court, above referred to, were properly assigned as error under the petition for a writ of error. See assignments 5, 6 and 8 contained in the Assignment of Errors at pages 399 to 403, inclusive, of the printed record.

III.

The brief of plaintiff in error specified the above rulings as errors relied upon in this court, and these errors were urged by way of argument. See pages 19 to 22, inclusive, and pages 83 to 90, inclusive, Brief of plaintiff in error.

I.

The opinion of this court, in affirming the judgment of the court below, places the points and errors presented in two groups, namely, first that there was not sufficient evidence of any negligence for which the Company was chargeable at law, and secondly, the erroneous instructions given to the jury. As to these two groups, the court finds, first, that the

evidence sufficiently showed negligence on the part of the Company, and secondly, that no sufficient exceptions had been taken to the instructions, but the court did not pass upon the point presented in this petition, although it was pressed upon the attention of the court. It is respectfully insisted that the rulings complained of were highly prejudicial, were properly excepted to, and were regularly assigned as error, and were of such controlling weight as to make a reversal imperative.

There was no complaint that a violation of the hours of service law in any manner contributed to the accident, and such violation was not alleged as a ground of action. On page 3 of the opinion of this court, the allegation of negligence contained in the complaint is copied in full and shows that the two grounds of negligence urged were the injury to the roadbed by the dumping of ashes, and the failure of the Company to maintain its roadbed in a safe condition. The violation of the hours of service act is not even remotely referred to.

II.

The record discloses that the violation of the hours of service law, if any, had not the slightest connection with or the remotest effect upon the

accident, and, even if such violation had been alleged in the complaint, it would not have constituted a ground of negligence. The argument presented in the brief of plaintiff in error is here referred to but will not be repeated.

The witness Larson testified that in going from Cordova to the bridge where the ashes were dumped, more than twenty-four hours had been consumed. Also—

> "Q. State whether or not the crews of these trains had been continuously in service, on duty, from the time they left here, up to that hour?
>
> (Objection—exception.)
>
> A. I think they had."
>
> (Printed record p. 59.)

The witness Lee after testifying as to the length of time consumed in the trip, which was more than 16 hours, was questioned as follows:

> "Q. Now tell the jury whether or not the train crews, the crew you have mentioned on the rotary and pusher engines, had been continuously on duty since they left Cordova?
>
> (Objection—exception.)
>
> A. Yes, sir."
>
> (Printed record p. 93.)

Again:

> "Q. When you reached Teikell how many

hours had you been continuously on duty up to the time you went off duty—how many continuous hours on that trip going up?

(Objection—exception.)

A. Forty-five hours and fifteen minutes my time shows."

(Printed record p. 145.)

We are presenting this ground for rehearing with all possible insistency because the ruling complained of and the evidence admitted, were, in the light of the record, of an extremely prejudicial nature and necessarily constitute reversible error. Counsel for plaintiff in his opening statement to the jury called attention to the violation of this hours of service law. Says the trial court, when ruling that the testimony was admissible: "You probably understand, without going into details, the statute referred to by Mr. Cobb in his statement." (Printed record p. 59.) At great length, counsel for the plaintiff below, examined the witnesses as to the length of the trip, and as to the time consumed, and instituted a comparison between the time taken up on this trip and by trains on other trips over the same route. All this was done over the objection and exception of the defendant; and finally, in defense of his position before the jury, counsel for the defendant requested that he be allowed a general exception to all that line of tes-

timony, and such exception was allowed by the court. (Printed record p. 87.)

To add to the prejudice of the trial court's error, the court specially submitted to the jury the question whether the hours of service law had been violated. If it be urged that this instruction was not excepted to, it is sufficient to say that if it did not add to the error already committed, it wholly failed to cure the prejudice.

We respectfully press upon the attention of this court the case of

St. Louis I. M. & S. R. Co. vs. McWhirter, 229 U. S. 263.

The Supreme Court, after stating that no warrant is found in the statute for holding carriers to the extreme liability of insurers, under the hours of service act, continue:

> "We say this because, although the act carefully provides punishment for violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime."

Again:

> "We are clearly of the opinion that, as there was no proof tending to show a connection

> between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed."

In the *McWhirter* case, not only was negligence charged, but also a violation of the act was alleged as inducing the accident. The reversible error in that case consisted in penalizing the Company for permitting its employes to work overtime, without reference to whether the accident was attributable to the act of working overtime. The reversible error here consists in permitting evidence to be received and retained in the record, necessarily prejudicing the rights of the Company, where there was no allegation in the complaint charging a violation of the act, and where in the very nature of the negligence actually charged in the complaint, the act of working overtime could not in any way contribute to or cause the accident.

The charge of the complaint is that the deceased was running as an engineer on the snow plow over the line of the railroad, and was injured because of the roadbed being allowed to become out of repair, and because the Company had not kept and maintained the roadbed in a safe condition. Therefore, if there had been an allegation in the complaint of working overtime, a fair construction of the complaint would show that there was no causal connec-

tion between the accident and the working overtime; but here we have the preposterous situation, first, of a complaint showing upon its face that the accident was of such a character that working overtime could not contribute to or cause the accident; and secondly, the complaint itself wholly fails to charge an act of working over time; and thirdly, the evidence adduced before the ruling was made showed that the act of working overtime could not affect the accident or contribute to the negligence charged; and lastly, with this situation fairly before the court, the impossible ruling was made that proof of working overtime was properly admissible. Counsel for the plaintiff below stated the statute to the jury, and the court in the presence of the jury ruled that the evidence was admissible because of and under the statute, and the questions proposed to the witnesses were propounded so as to fall within the reading of the statute, and finally the court wholly failed at any stage in the trial to correct the error which had been committed over the objection of the defendant, but rather emphasized and insisted to the jury that the evidence had been admitted so that the jury could determine the negligence or want of negligence on the part of the Company by reference to whether the statute had been violated or not.

This highly objectionable evidence was offered for the very purpose of fastening liability under the statute and was received by the court under the openly expressed view that it was admissible for that purpose. And this, too, in the teeth of the uncontrovertible fact that there was no allegation of any violation of the statute, and against pleaded facts in the complaint which showed that the accident could not be attributed to the fact of working overtime, and in the face of a record "demonstrating with mathematical certainty" that the defendant was not liable within the terms of the statute regardless of the state of the pleadings.

As in the *McWhirter* case, the ruling in the case at bar was made by the lower court under the mistaken theory that the mere act of permitting an employe to work beyond the statutory period created liability irrespective of the connection between that fact and the injury complained of.

If it be prejudicial error to receive proof of claimed negligence which is not alleged, or if it be prejudicial error to receive proof of a fact under an erroneous ruling that such a fact creates an absolute, statutory liability, or if it be prejudicial error to hold up to a jury throughout a trial a wholly false theory of liability and invite a verdict

upon that theory, then the ruling complained of is reversible error.

Respectfully submitted,

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LAWRENCE BOGLE,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss.
COUNTY OF KING.

I, CARROLL B. GRAVES, one of counsel for plaintiff in error in the above entitled case, and the counsel who prepared the above and foregoing petition for rehearing, do hereby certify that in my judgment the said petition for rehearing is well founded, and that it is not interposed for delay.

Dated this 3rd day of March, A. D., 1914.

CARROLL B. GRAVES,
Of Counsel for Plaintiff in Error.